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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	85554445
Applicant	All-Ways Forwarding Int'l Inc.
Applied for Mark	ALL-WAYS
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

_____)
In re:)
)
Serial No. 85/554,445)
)
Applicant: ALL-WAYS FORWARDING)
INT'L INC.)
)
Filed: February 28, 2012)
)
ALL-WAYS)
_____)

APPLICANT'S APPEAL BRIEF

Applicant, All-Ways Forwarding Int'l Inc., hereby appeals to the Trademark Trial and Appeal Board from the Examiner's Final Rejection dated September 28, 2012. Applicant filed a Notice of Appeal on March 28, 2013, simultaneously with a Request for Reconsideration. After reconsideration, the Examiner withheld the final rejection and the appeal resumed on May 1, 2013. The initial due date for the Appeal Brief was July 1, 2013. Applicant subsequently filed a request for a thirty day extension which was granted. Thus, this APPEAL BRIEF is being timely filed by the deadline of July 31, 2013.

FACTS OF THE CASE

On February 28, 2012 Applicant applied for a federal trademark registration for the trademark ALL-WAYS for the following services:

**Class 35: CUSTOMS CLEARANCE SERVICES; IMPORT-EXPORT AGENCIES
N THE FIELD OF GOURMET FOOD AND SPIRITS, FRESH FRUITS AND
VEGETABLES,GARMENTS, TEXTILES AND OTHER GENERAL
MERCHANDISE; BUSINESS ADVISORY SERVICES IN THE FIELD OF FDA
SPECIALIST FOR FOOD IMPORTS; BUSINESS SERVICES, NAMELY
FREIGHT INFORMATION MANAGEMENT SERVICES, SHIPMENT**

PROCESSING, PREPARING SHIPPING DOCUMENTS AND INVOICES, TRACKING DOCUMENTS, PACKAGES AND FREIGHT OVER COMPUTER NETWORKS, INTRANETS AND INTERNETS; INFORMATION MANAGEMENT SERVICES, NAMELY SHIPMENT PROCESSING, PREPARING SHIPPING DOCUMENTS AND INVOICES, TRACKING DOCUMENTS, PACKAGES AND FREIGHT OVER COMPUTER NETWORKS, INTRANETS AND INTERNETS.

Class 39:

AIR FREIGHT SHIPPING SERVICES: AIRLINE AND SHIPPING SERVICES: FREIGHT FORWARDING SERVICES: FREIGHT LOADING SERVICES; GLOBAL TRANSPORTATION OF FREIGHT FOR OTHERS BY ALL AVAILABLE MEANS; SUPPLY CHAIN LOGISTICS AND REVERSE LOGISTICS SERVICES, NAMELY STORAGE, TRANSPORTATION AND DELIVERY OF DOCUMENTS, PACKAGES, RAW MATERIALS AND OTHER FREIGHT FOR OTHERS BY AIR, RAIL SHIP OR TRUCK: WAREHOUSING SERVICES, NAMELY, STORAGE, DISTRIBUTION, PICK-UP, PACKING AND SHIPPING OF GOURMET FOOD AND SPIRITS, FRESH FRUITS AND VEGETABLES, GARMENTS, TEXTILES AND OTHER GENERAL MERCHANDISE.

On June 7, 2012 the Examiner issued a non-final office action refusing to register services in Class 39 only, based on a likelihood of confusion with U.S. Registration No. 4,015,760 for the mark ALL WAYS MOVING & STORAGE as applied to “moving company services” (referred to herein as the “Registrant’s mark”). The Examiner’s rejection was based on the similarity of the marks as well as relatedness of the services.

The services in Class 35 were deemed allowable and are not disputed in this appeal. In fact, the Applicant filed a divisional application directed to the recited services in Class 35 which has now issued as Registration No. 4,338,901.

Applicant filed a response on September 20, 2012 supporting the position that Applicant’s mark for services in Class 39 are not likely to be confused with the Registrant’s mark. The Examiner did not find these arguments persuasive and maintained her refusal and issued a final office action on September 28, 2012.

As mentioned above, the Applicant filed a Notice of Appeal simultaneously with filing a Request for Reconsideration on March 28, 2013. The arguments presented in the

reconsideration did not persuade the Examiner to permit registration of the Applicants' mark for services in Class 39.

ISSUE TO BE DECIDED

Whether the Applicant's mark ALL-WAYS in connection with the identified freight forwarding services in Class 39 is likely to cause confusion with the Registration No. 4,015,760 for the mark ALL WAYS MOVING & STORAGE as applied to "moving services."

ARGUMENTS

I. APPLICANTS MARK "ALL-WAYS" IS NOT CONFUSINGLY SIMILAR TO REGISTRANTS MARK "ALL WAYS MOVING & STORAGE"

There is no likelihood of confusion with the Registrant's mark ALL WAYS MOVING & STORAGE since Applicant's mark ALL-WAYS is distinctive and possesses a different appearance, sound and commercial impression than the Registrants mark.

A. THE TEST FOR CONFUSING SIMILARITY

Applicant sets forth below the reference from which it argues its position and basis for registrability.

The Lanham Act is intended to provide protection from confusion on the consumer level. It is intended to be measured in the actual marketplace and not in the abstract. As stated by the Court of Customs and Patent Appeals (CCPA) in In re E.I. DuPont de Nemours & Co. 476 F2d 1357, 177 U.S.P.Q. 563, (CCPA 1973) the objective of the Lanham Act is "making registration more liberal, dispensing with mere technical prohibitions and arbitrary provisions and modernizing the trademark statutes so that they

will conform to legitimate present day business practice.” Dupont de Nemours & Co. 177 U.S.P.Q. at 566.

The basic goal of the Lanham Act, as stated by the CCPA was “the protection of trademarks, securing to the owner the goodwill of his business and protecting the public against spurious and falsely marked goods.” Dupont de Nemours & Co. 177 U.S.P.Q. at 567. In the instant case, the granting of Applicant’s registration will neither transgress upon any goodwill of the cited registrant nor harm the purchasing public.

Section 2 of the Lanham Act provides:

No *trademark* by which the goods of the applicant may be distinguished from the goods of others *shall be refused registration* on the principal register on account of its nature unless it . . .

(d) consists of or comprises a mark which so resembles a [prior mark] as to be likely, when used on or in connection with the goods of the applicant to cause confusion . . .

15 U.S.C. §1052(d) Emphasis supplied.

The test for likelihood of confusion is “whether an appreciable number of ordinarily prudent purchasers” are likely to confuse the source of the newcomer’s products or services with the source of another existing mark. Solton, Inc. v. Cornwall, Corp. 477 F.Supp. 975, 989 (D.C. N.M. 1979) Emphasis supplied. This test must be considered in perspective. Marks are to be viewed in the context of legitimate present day business practice. Hence, only marks that are confusingly similar to the extent that they disrupt legitimate present day business practice should be refused.

The ultimate question of likelihood of confusion is one of fact and numerous factors are relevant in making that determination. These factors include a comparison of the relevant marks, the services, the care and sophistication of relevant purchasers and other factors. E.I. DuPont, *supra* at p. 566-67; see *also* TMEP §1207.01.

B. COMPARING THE MARKS

Among the factors considered in determining likelihood of confusion are the similarity of the marks as to appearance, sound, meaning, commercial impression and the similarity of the goods (services). . E.I. DuPont, *supra* at p. 567; see *also* TMEP §1207.01. With these factors in mind, a comparison viewing of these marks show that Applicant's mark portrays a different sound, appearance and commercial impression from the cited registration.

ALL-WAYS

Applicant's mark

ALL WAYS MOVING & STORAGE

Registrant's mark

The difference in appearance is obvious. While both marks include the term ALL WAYS, the Applicant's mark contains a hyphen which changes the emphasis and pronunciation of the terms. Because of the hyphen the term is pronounced with two syllables. This change in emphasis also changes the meaning of the term. As seen in the description of services the Applicant provides freight forwarding services "all" "ways" via ship, truck, rail and air.

In contrast, Registrant's mark is ALL WAYS MOVING & STORAGE. There is no hyphen between ALL and WAYS, thus the terms are pronounced as only one syllable, not two as in Applicants mark. When spoken these terms sound like "always." It is noted that the Registrant also owns Registration No. 3,397,687 for the mark OUR BUSINESS IS MOVING as applied to "moving and storage of household items." It is thus, apparent that the meaning of Registrants mark is that they are "always" moving household items.

In sum, the appearance, sound, meaning and commercial impression between the marks is quite distinct, which would eliminate the likelihood of any confusion between the marks.

II. EVEN THOUGH THE REGISTRANTS MARK DISCLAIMS THE TERMS “MOVING AND STORAGE” THEY ARE STILL PART OF THE REGISTRANT’S MARK WHICH IS DISTINCT FROM APPLICANT’S MARK ALL-WAYS

In the final rejection the Examiner points out that the Registrant disclaims the terms “MOVING & STORAGE” and that the dominant portion of the mark is ALL WAYS which is identical to the Applicant’s mark.

Even though these terms are disclaimed they are still part of the mark which must be looked at in its entirety. Consumers are not aware that the Registrant has disclaimed the terms “moving and storage” and only recognize the Registrant’s mark in it’s entirety as ALL WAYS MOVING & STORAGE.

Merely altering, adding, or eliminating even a single letter can create a different commercial impression for prospective customers. See, e.g., *Nestle Co. v. Nash-Finch Co.*, 4 U.S.P.Q.2d 1085 (T.T.A.B. 1987) (DELIQUICK creates a different commercial impression from NESTLE QUICK and QUICK); *Nabisco Brands, Inc. v. Quaker Oats Co.*, 547 F.Supp. 1244, 216 U.S.P.Q. 770 (D.N.J. 1982) (CREAM OF WHEAT was found not to be confusingly similar to CREAMY WHEAT even though both marks are used for breakfast cereals); and *Jacobs v. International Multifoods Corp.*, 668 F.2d 1234, 212 U.S.P.Q. 641 (C.C.A.P. 1982) (BOSTON SEA PARTY was found not to be confusingly similar to BOSTON TEA PARTY).

In the present case, the registered mark ALL WAYS MOVING & STORAGE differs visually and phonetically from Applicant's ALL-WAYS mark, thereby creating an impression easily distinguishable from that of Applicant's mark. The additional wording "Moving & Storage" provides the consumer with terms descriptive of the Registrants services thereby further creating unitary impressions completely unlike that of Applicant's mark.

III. APPLICANTS FREIGHT FORWARDING SERVICES ARE DISTINCT FROM REGISTRANTS MOVING COMPANY SERVICES AND THEIR RESPECTIVE CONSUMERS ARE IN DIFFERENT CLASSES

Another DuPont factor relevant to the present case is the "similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." DuPont, 476 F.2d at 1361. This "relatedness of the goods" factor compares the services in the applicant's application with the services in Registrants registration. CBS, Inc. v. Morrow, 708 F.2d 1579, 1581, 218 USPQ 198, 199 (Fed.Cir.1983). Even if the goods and services in question are not identical, the consuming public may perceive them as related enough to cause confusion about the source or origin of the goods and services. Recot, 214 F.3d at 1329.

Applicant All-Ways Forwarding Int'l Inc was founded in 1982. They are based in New Jersey but their services expand the globe. They are a full service customs clearance and freight forwarding operation, delivering seamless freight forwarding logistic services. They have expertise with gourmet food, fresh fruit and vegetables, spirits, garments and textiles as well as general merchandise. They offer services relating to import and customs clearance, export and international freight forwarding, air and ocean transport, online freight tracking, international cargo insurance, custom bonds. They are one of the largest regional customs brokers in the New York metro area. Applicant has been using their mark on their respective services at least as early as January 1, 1982.

The Registrant is located in Pennsylvania, outside the New York metropolitan area, and appears to offer only localized services. Their website states they are an experienced moving company to help with residential moving needs. Their registration states they have been using their mark on the respective services since May 18, 1990.

The services of the Registrant's mark are distinct from the Applicant's and their respective consumers are different. The **ALL WAYS MOVING & STORAGE**

Registration describes the services in general as being merely “moving company services.”

In contrast Applicant’s services specifically relate to “Air freight shipping services; Airline and shipping services; Freight forwarding services; Freight loading services; Global transportation of freight for others by all available means; Supply chain logistics and reverse logistics services, namely, storage, transportation and delivery of documents, packages, raw materials, and other freight for others by air, rail, ship or truck; Warehousing services, namely, storage, distribution, pick-up, packing, and shipping of gourmet food and spirits, fresh fruits and vegetables, garments, textiles and other general merchandise.”

The Examiner in her final refusal asserts that the Applicant’s services are related to the Registrant’s services because she “presumes that the services are to the same class of consumers” and that the “broad wording of the Registrants moving company services is presumed to encompass the Applicant’s narrow identification.”

The Examiner further states in the final rejection that “the overriding concern is not only to prevent buyer confusion as to the source of the services, but to protect the registrant from adverse commercial impact due to use of a similar mark by a newcomer.”

The Examiner has no basis to presume that the Registrants’ moving company services would encompass the narrow identification of services recited in Applicant’s application. An ordinary person hearing the term “moving company services” would assume these services to be related to moving ones home or business, and not Applicants specialized freight forwarding services. In fact “moving company services” is not even recited in Applicant’s recitation of services.

Applicant has had a global presence for over three decades. Their services are highly specialized and directed to a class of consumers who need these specific services. The consumer that utilizes the Applicants services need a full service customs clearance and

freight forwarding company that can deliver seamless freight forwarding logistic services. These services are not provided by the Registrant.

Applicant's consumers also typically have special needs to ship, transport or distribute gourmet food, fresh fruit and vegetables, spirits, garments and textiles. Consumers of Applicant's services look to them to provided import and customs clearance, export and international freight forwarding, air and ocean transport, online freight tracking, international cargo insurance, custom bonds. As one of the largest regional customs brokers in the New York metro area, Applicant has a large consumer base.

In contrast, Registrant's consumers are believed to be typically either individuals or businesses that are relocating and seeking "moving services." It is clear that the services between the companies are distinct and that the class of respective consumers is different.

In fact, in the 23 years both companies have been using their respective marks there has been no actual consumer confusion between them, thus supporting that there is no likelihood of confusion.

IV. THIRD PARTY REGISTRATIONS PRESENTED BY THE EXAMINER SUPPORTING EMANATION OF SIMILAR SERVICES FROM A SINGLE SOURCE IS NOT RELEVANT

In her final refusal and in her response to Applicants request for reconsideration, the Examiner provided examples of third party marks registered for use in connection with the same or similar services to those of the Applicant and Registrant. The Examiner states that this evidence shows that the services listed namely "moving company services" and "freight forwarding services" are of a kind that may emanate from a single source under a single mark. While this may be true for the marks the Examiner has presented as evidence it is clearly not the case in this matter. The Registrants mark is limited to the services described in the registration which is merely "moving company services." The service description cannot be expanded to include additional services, especially if it was not the intention of the owner, which is apparent in the present case. If

the Registrant had meant its services to cover anything other than “moving services” it would have, or should have been included in their description of services. Just because it may be so in the examples the Examiner presented doesn’t make it so in this case.

V. THIRD PARTY REGISTRATIONS INCLUDING THE TERMS ALL WAYS SUPPORT REGISTRATION OF APPLICANT’S ALL-WAYS MARK

The following registrations include the term ALL WAYS.

Registration	Mark	Class
3,159,349	ALL WAYS PAYS	9
3,415,280	ALL-WAYS SQUARE	11
3,415,286	ALL WAYS GRAPHICS	35, 40, 42
3,547,463	ALL WAYS ZEN	9
3,717,248	CHILE ALWAYS SUPRISING	9, 16, 35, 41
3,779,029	ALL WAYS DOGZ	41, 44
3,675,665	NISCAYAH SERVICE ALL-WAYS	37
3,739,794	ALL WAYS IN TOUCH	9, 38
3,983,173	ALL WAYS GREEN	1
3,634,334	ALL-WAYS ACCESSIBLE	35, 37
3,148,671	ALL WAYS REALTY	36
4,213,520	LOVE ALL WAYS	20
4,180,138	ALL WAYS GREEN	41, 44
4,180,139	ALL WAYS GREEN	41, 44

Applicant also owns Registration No. 4,338,901 for the ALL-WAYS mark as applied to services in Class 35 recited on the first page of this brief, as well as Registration No. 4,342,763 for the logo mark ALL-WAYS FORWARDING INT’L INC.

These numerous registrations which include the term ALL WAYS illustrate the terms as applied to the respective goods or services are distinguishable from each other and support the registration of the pending application.

CONCLUSION

WHEREFORE, Applicant respectfully requests that the Examiner's refusal of registration be reversed and that the registration be granted on the Principal Register.

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